No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
MATTHEW GUARNIERI
Assistants to the Solicitor General
ROBERT A. PARKER
JOHN P. TADDEI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 3
Reasons for granting the petition 11
A. The court of appeals' decision is wrong 12
1. The statutory language and structure support a case-specific inquiry under Section 924(e)(3)(B) 12
2. Nothing requires an interpretation of Section 924(e)(3)(B) that would render it unconstitutional 16
B. The question presented warrants this Court's review 21
Conclusion 27
Appendix A — Court of appeals opinion (Sept. 7, 2018) 1a
Appendix B — Court of appeals opinion (Jan. 31, 2017) 10a
Appendix C — District court sentencing transcript (Mar. 17, 2016) 18a
Appendix D — District court sentencing transcript (Mar. 13, 2016) 21a
Appendix E — Constitutional and statutory provisions 24a

TABLE OF AUTHORITIES

Cases:

Blodgett v. *Holden*, 275 U.S. 142 (1927) 22
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) 17
Deal v. *United States*, 508 U.S. 129 (1993) 7
Department of Transp. v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015) 21
Descamps v. *United States*, 570 U.S. 254 (2013) 19

Cases—Continued: Page

Holder v. *Humanitarian Law Project*, 561 U.S. 1 (2010) 21
INS v. *St. Cyr*, 533 U.S. 289 (2001) 20
Irby, In re, 858 F.3d 231 (4th Cir. 2017) 23
James v. *United States*, 550 U.S. 192 (2007) 18
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 20
Johnson v. *United States*, 135 S. Ct. 2551 (2015) ..... *passim*
Lee v. *United States*, 137 S. Ct. 1958 (2017) 25
Matal v. *Tam*, 137 S. Ct. 1744 (2017) 21
Moncrieffe v. *Holder*, 569 U.S. 184 (2013) 18
Neder v. *United States*, 527 U.S. 1 (1999) 26
Nijhawan v. *Holder*, 557 U.S. 29 (2009) 13, 14
Roberts v. *Sea-Land Air Servs., Inc.*, 566 U.S. 93 (2012) 17
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 22
Sessions v. *Dimaya*, 138 S. Ct. 1204 (2018) ..... *passim*
Shepard v. *United States*, 544 U.S. 13 (2005) 18, 19
Shuti v. *Lynch*, 828 F.3d 440 (6th Cir. 2016), cert. denied, 138 S. Ct. 1977 (2018) 23
Taylor v. *United States*, 495 U.S. 575 (1990) 17
United States v. *Alvarez*, 567 U.S. 709 (2012) 21
United States v. *Barrett*, No. 14-2641, 2018 WL 4288566 (2d Cir. Sept. 10, 2018) 15, 17, 19, 22, 23
United States v. *Comstock*, 560 U.S. 126 (2010) 21
United States v. *Credit*, 95 F.3d 362 (5th Cir. 1996), cert. denied, 519 U.S. 1138 (1997) 8

Cases—Continued: Page

United States v. *Eshetu*:
863 F.3d 946 (D.C. Cir. 2017), vacated in part, 898 F.3d 36 (D.C. Cir.), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018) 24
898 F.3d 36 (D.C. Cir.), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018) 22
United States v. *Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016), vacated, 138 S. C.t. 2668 (2018) 7
United States v. *Hayes*, 555 U.S. 415 (2009) 14
United States v. *Jenkins*, 849 F.3d 390 (7th Cir. 2017), vacated, 138 S. Ct. 1980 (2018) 25
United States v. *Kebodeaux*, 570 U.S. 387 (2013) 21
United States v. *Prickett*, 830 F.3d 760 (8th Cir.), vacated, 839 F.3d 697 (8th Cir. 2016), cert. denied, 138 S. Ct. 1976 (2018) 23
United States v. *Robinson*, 844 F.3d 137 (3d Cir. 2016), cert. denied, 138 S. Ct. 215 (2017) 18, 19, 23
United States v. *Rodriguez-Moreno*, 526 U.S. 275 (1999) 13, 14
United States v. *Salas*, 889 F.3d 681 (10th Cir.), petition for cert. pending (filed Oct. 3, 2018) 22, 24
United States v. *St. Hubert*, 883 F.3d 1319 (11th Cir.), petition for cert. pending, No. 18-5269 (filed July 13, 2018) 19, 23
United States v. *Stevens*, 559 U.S. 460 (2010) 21
United States v. *Williams*, 553 U.S. 285 (2008) 21
United States ex rel. Att'y Gen. v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909) 21

Cases—Continued: Page

Velleff v. *United States*, 307 F. Supp. 3d 891 (N.D. Ill.), appeal pending, No. 18-2308 (7th Cir. filed June 14, 2018) 25
Zivotofsky v. *Kerry*, 135 S. Ct. 2076 (2015) 21

Constitution and statutes:

U.S. Const. Amend. VI 19, 20, 24a
Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii) 6
Hobbs Act, 18 U.S.C. 1951(a) 3, 5, 30a
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 8
8 U.S.C. 1101(a)(43)(M) 13
18 U.S.C. 2 ..... 3, 5
18 U.S.C. 16(b) ..... *passim*, 24a
18 U.S.C. 844(i) 16
18 U.S.C. 844(n) 16
18 U.S.C. 921(a)(33)(A) 14
18 U.S.C. 922(g)(1) 5, 25a
18 U.S.C. 924(c) ..... *passim*
18 U.S.C. 924(c)(1)(A) 2, 5, 14, 25a
18 U.S.C. 924(c)(1)(A)(i) 2, 26a
18 U.S.C. 924(c)(1)(A)(ii) 2, 7, 26a
18 U.S.C. 924(c)(1)(A)(iii) 2, 26a
18 U.S.C. 924(c)(1)(B)(i) 3, 5, 7, 26a
18 U.S.C. 924(c)(1)(C)(i) 7, 26a
18 U.S.C. 924(c)(3) 2, 6, 14, 27a
18 U.S.C. 924(c)(3)(A) 3, 6, 14, 24, 27a
18 U.S.C. 924(c)(3)(B) ..... *passim*, 27a
21 U.S.C. 858 15
Ala. Code § 13A-6-24(a) (LexisNexis 2015) 15

Statutes—Continued: Page

Alaska Stat. § 11.41.250(a) (2016) 15
Ariz. Rev. Stat. Ann. § 13-1201(A) (2010) 15
Ark. Code Ann. § 5-13-205(a)(1) (2013) 15
Conn. Gen. Stat. Ann. § 53a-111(a) (West 2012) 15
Ind. Code Ann. § 35-43-4- 2(a) (LexisNexis Supp. 2018) 15
Iowa Code Ann. § 709.3(1) (West 2016) 15
Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2017) 15
Mass. Ann. Laws ch. 265, § 13L (LexisNexis 2010) 15
N.Y. Penal Law § 120.20 (McKinney 2009) 15
Utah Code Ann. § 76-5-301(1)(b) (LexisNexis 2017) 15

Miscellaneous:

Oxford Dictionary of English (3d ed. 2010) 16
U.S. Courts, *Table D-2—U.S. District Courts–Criminal Statistical Tables For The Federal Judiciary* (Dec. 31, 2017), http://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2017/12/31 24

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is not yet reported in the Federal Reporter but is available at 2018 WL 4268432. A prior opinion of the court of appeals (App., *infra*, 10a-17a) is not published in the Federal Reporter but is reprinted at 677 Fed. Appx. 933.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924 provides in pertinent part:

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. See App., *infra*, 24a-31a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, respondents Maurice Davis and Andre Glover were each convicted on one count of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); multiple counts of robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; and two counts of brandishing a short-barreled shotgun during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(i) and 2. Glover Judgment 1; Davis Am. Judgment 1. The district court sentenced Glover to 498 months of imprisonment, to be followed by two years of supervised release, and it sentenced Davis to 608 months of imprisonment, to be followed by two years of supervised release. Glover Judgment 2; Davis Am. Judgment 2. The court of appeals affirmed. App., *infra*, 1a-11a. This Court granted respondents' petitions for writs of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). On remand, the court of appeals vacated one Section 924(c) conviction as to each respondent and remanded the case to the district court. App., *infra*, 6a.

1. Respondents were involved in a weeklong string of gunpoint robberies of four convenience stores in and around Dallas, Texas. See Gov't C.A. Br. 2-10 (summarizing trial evidence); Gov't Second Supp. C.A. Letter Br. 24-25 (same). Each robbery followed a similar pattern: two people would arrive in a gold SUV with no license plates; one would point a short-barreled shotgun at an employee and issue orders; and the robbers would take cigarettes and, in one case, money. See Gov't C.A. Br. 2-10; Gov't Second Supp. C.A. Letter Br. 24-25.

The first robbery, for example, occurred at 3 a.m. on June 16, 2014, at a convenience store outside Dallas. 11/18/15 Tr. 81-89. After arriving in the SUV, one of the robbers grabbed the only on-duty employee from behind, put a short-barreled shotgun to her side, and asked if she had a "money bag." *Id.* at 82, 88-90. When she explained that she could not open the store's safe, the robber ordered her to take him to a storage room and forced her to lie face down on the floor there. *Id.* at 90-93. The employee "was doing a lot of crying," and the robber told her that "he was going to hurt [her] if [she] didn't be quiet." *Id.* at 93. The second robber then entered the storage room, and both robbers began filling bags with cartons of cigarettes. *Id.* at 92-94, 96. When they were done, one of the robbers told the employee to wait 30 seconds before calling the police or he would kill her. *Id.* at 98.

Soon after the fourth robbery (on June 22, 2014), law enforcement agencies broadcast a lookout describing the robbers and their gold SUV. 11/17/15 Tr. 179-183. Officers spotted respondents, who matched the robbers' descriptions, in a gold SUV, which the officers attempted to stop at a McDonald's drive-through. *Id.* at 182-185. When an officer, with his weapon drawn, ordered them

to show their hands, respondents fled. *Id.* at 185. A chase ensued, with speeds reaching 85 to 95 miles per hour in "[e]xtremely dangerous and wet" conditions. *Id.* at 219; see *id.* at 187-188. After about two miles, respondents crashed the SUV into a concrete ditch and fled on foot, leaving behind a trail of cash. *Id.* at 188-191.

Officers quickly caught Glover, 11/17/15 Tr. 194-196, and later discovered Davis hiding in bushes and sitting atop a pile of cash, *id.* at 196-197. Inside the SUV, officers found numerous cartons of cigarettes, a short-barreled shotgun, a bank deposit bag from the safe of one of the stores that had been robbed, and articles of clothing that matched items worn by the individuals who carried out the robberies. See 11/18/15 Tr. 7, 12-15, 21-25. Davis later admitted his involvement in two of the robberies and stated that he had committed them with another person. *Id.* at 69-72.

2. A grand jury in the Northern District of Texas indicted respondents on one count of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); two counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(i) and 2; and three counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2. Indictment 1-6, 8-10. Glover was also charged with an additional count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, and Davis was charged with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 7, 11.

Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute contains its own specific definition of "crime

of violence," which is applicable only "[f]or purposes of this subsection," 18 U.S.C. 924(c)(3), and which has two subparagraphs, (A) and (B). Section 924(c)(3)(A) specifies that the term "crime of violence" includes any "offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Section 924(c)(3)(B) specifies that the term "crime of violence" also includes any "offense that is a felony * * * that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B).

Before trial, respondents moved to dismiss the Section 924(c) counts. They argued that the crimes of violence identified in those counts—Hobbs Act robbery and conspiracy to commit Hobbs Act robbery, Indictment 5, 10—did not qualify as crimes of violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Court invalidated on vagueness grounds the residual clause in the sentence-enhancement provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which classifies an offense underlying a prior conviction as a "violent felony" if that prior offense "otherwise involves conduct that presents a serious potential risk of physical injury to another." The district court denied respondents' motion. App., *infra*, 19a, 22a.

The jury found Glover guilty on all counts and Davis guilty on all counts except one Hobbs Act robbery count. D. Ct. Doc. 83, at 1-3 (Nov. 19, 2015). For the Section 924(c) charges, the jury made special findings that respondents brandished a short-barreled shotgun

during each crime of violence. *Id.* at 2-3; see 18 U.S.C. 924(c)(1)(A)(ii) and (B)(i) (enhanced penalties for brandishing and possession of a short-barreled shotgun). The district court sentenced Glover to concurrent terms of 78 months of imprisonment on the Hobbs Act counts, a consecutive term of 120 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 498 months of imprisonment. Glover Judgment 2; see 18 U.S.C. 924(c)(1)(C)(i) (enhanced sentence for "second or subsequent" Section 924(c) conviction); *Deal* v. *United States*, 508 U.S. 129, 132-137 (1993). The court sentenced Davis to concurrent terms of 188 months of imprisonment on the Hobbs Act counts, a concurrent term of 180 months on the felon-in-possession count, a consecutive term of 120 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 608 months of imprisonment. Davis Am. Judgment 2.

3. The court of appeals affirmed. App., *infra*, 10a-17a. As relevant here, the court rejected respondents' renewed constitutional challenge to their Section 924(c) convictions. *Id.* at 12a-14a. It relied on a recent en banc decision that had held that the definition of "crime of violence" in 18 U.S.C. 16(b), which is linguistically nearly identical to Section 924(c)(3)(B), was "not unconstitutionally vague in light of *Johnson*" because of textual differences between Section 16(b) and the ACCA's residual clause. App., *infra*, 13a (citing *United States* v. *Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), vacated, 138 S. Ct. 2668 (2018)).

The court of appeals also rejected Glover's alternative contention that "the jury should decide what constitutes a crime of violence." App., *infra*, 14a n.4; see Glover

C.A. Br. 18, 25-26. The Court observed that circuit precedent identified a crime-of-violence determination as "a question of law reserved for the judge." App., *infra*, 14a n.4 (citing *United States* v. *Credit*, 95 F.3d 362, 364 (5th Cir. 1996), cert. denied, 519 U.S. 1138 (1997)). The government's appellate brief, in addition to noting that the construction was foreclosed by circuit precedent, had also explained that any failure to submit the determination to the jury in this case had been harmless, because "the evidence was overwhelming" that respondents' crimes were "committed * * * in a way that involved the use or threatened use of force or posed a substantial risk that force would be used." Gov't C.A. Br. 28-29. The government observed, for example, that Glover "thrice put a sawed-off shotgun to a woman—and his accomplice did so once—to demand her submission to his theft of cigarettes." *Id.* at 27.

4. Respondents petitioned for writs of certiorari, seeking review of the question whether the definition of "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. See App., *infra*, 1a.

While respondents' petitions were pending, this Court decided *Sessions* v. *Dimaya*, *supra*. In *Dimaya*, the Court held unconstitutionally vague the definition of "crime of violence" in 18 U.S.C. 16(b), as incorporated into the removability provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 138 S. Ct. at 1210, 1213. Section 16(b)—which defines a "crime of violence" to include "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 16(b)—is linguistically nearly identical to Section 924(c)(3)(B). But unlike Section

924(c)(3)(B), and like the ACCA's residual clause, it applies in circumstances that include the classification of prior convictions—as in *Dimaya* itself, where an alien's state conviction had led to federal removal proceedings. See 138 S. Ct. at 1212-1213.

The Court explained that Section 16(b), as incorporated into the INA, suffered from "the same two features," "combined in the same constitutionally problematic way," that had led the Court to find the ACCA's residual clause unconstitutionally vague in *Johnson*. *Dimaya*, 138 S. Ct. at 1213. The first feature was a "categorical approach" to the crime-of-violence inquiry, under which a court would seek "to identify a crime's 'ordinary case'" and to assess whether the crime, in that idealized "ordinary case," poses a substantial risk that physical force will be used. *Id.* at 1215-1216. Second, the statute left "uncertainty about the level of risk that makes a crime 'violent.'" *Id.* at 1215.

The Court emphasized in *Dimaya*, as it had in *Johnson*, that it "'d[id] not doubt' the constitutionality of applying" a "'substantial risk'" standard like Section 16(b)'s "'to real-world conduct,'" rather than "'a judge-imagined abstraction.'" 138 S. Ct. at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2558, 2561). And the Court did not hold that Section 16(b) "demands a categorical approach." *Id.* at 1216. A plurality of Justices took the view that Section 16(b) was "[b]est read" that way. See *id.* at 1217 (opinion of Kagan, J.). But Justice Gorsuch, in describing "some limits on today's holding," noted that he had only "proceeded on the premise" that the INA, "as it incorporates" Section 16(b), employed a categorical approach. *Id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment). He stated that he "remain[ed] open to different arguments" in a future

case, and observed that "no party" had argued against a categorical approach, that precedent "seemingly require[d]" it, and that "the government itself ha[d] conceded (repeatedly) that the law compels it." *Id.* at 1232-1233. In dissent, Justice Thomas, joined by Justices Kennedy and Alito, would have forgone a categorical approach to Section 16(b) in favor of a focus on the underlying, real-world conduct of the alien's prior offense. *Id.* at 1254-1259; see also *id.* at 1234-1242 (Roberts, C.J., dissenting) (not addressing the issue).

The Court subsequently granted respondents' petitions, vacated the judgment of the court of appeals in respondents' case, and remanded to the court of appeals for further consideration in light of *Dimaya*. See 138 S. Ct. 1979, 1979; 138 S. Ct. 1979, 1979-1980.

5. On remand, the government acknowledged that it had previously argued, consistent with circuit precedent, that Section 924(c)(3)(B) requires an ordinary-case categorical approach of the sort ascribed to Section 16(b) in *Dimaya*. Gov't Second Supp. C.A. Letter Br. 6. The government observed, however, that such an interpretation "raise[d] serious constitutional questions" in light of *Dimaya*, and it accordingly urged the court of appeals to avoid those questions by construing Section 924(c)(3)(B) to instead require a "case-specific approach." *Id.* at 6-7 (emphasis omitted). Under that construction, "the classification of an offense as a 'crime of violence' under" Section 924(c)(3)(B) would "be based on the defendant's actual conduct" that gave rise to the Section 924(c) prosecution. *Id.* at 6. It would therefore be an inquiry that "present[ed] a mixed question of law and fact that must either be resolved by a jury or admitted by the defendant in connection with a guilty

plea," *id.* at 6-7, rather than the sort of inquiry that *Dimaya* had identified as one of two factors that jointly required invalidating Section 16(b) as incorporated into the INA.

The court of appeals, however, refused to construe Section 924(c)(3)(B) in a manner that would avoid the constitutional difficulties identified in *Dimaya* and instead struck down Section 924(c)(3)(B) as impermissibly vague. App., *infra*, 5a. It adhered to circuit precedent applying an ordinary-case categorical approach to Section 924(c)(3)(B) and concluded that the provision, so construed, was unconstitutional in light of *Dimaya*. *Id.* at 4a-5a. And, reasoning that conspiracy to commit Hobbs Act robbery could qualify as a crime of violence for Section 924(c) only under the definition in Section 924(c)(3)(B), it vacated the convictions for which that crime was the predicate offense and remanded to the district court with instructions to enter a revised sentence that excised the periods of imprisonment that had been based on those counts. *Id.* at 4a, 6a. Judge Higginbotham authored a separate opinion that concurred in the vacatur of the convictions, but objected to the failure to remand for a full resentencing. *Id.* at 7a-9a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in construing 18 U.S.C. 924(c)(3)(B) in a manner that it deemed unconstitutional under *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). In doing so, it struck down a federal statute of critical importance to the prosecution of violent crime, contributed to a growing circuit disagreement, and threatened the outcomes of a great number of current, future, and even past criminal cases. This Court's prompt intervention is necessary.

A. The Court Of Appeals' Decision Is Wrong

Although the government has previously advocated an ordinary-case categorical approach to the determination whether an offense constitutes a "crime of violence" under Section 924(c)(3)(B), nothing in the statute or the decisions of this Court requires such an approach. Section 924(c)(3)(B)'s subsection-specific "crime of violence" definition is applicable only to the conduct for which the defendant is currently being prosecuted, not to any conduct for which the defendant may have been convicted in the past. It can naturally be read as inviting a case-specific determination as to whether *that* currently at issue conduct—not the hypothetical conduct of an "ordinary case"—satisfies the substantial-risk test in 18 U.S.C. 924(c)(3)(B). And, so construed, Section 924(c)(3)(B) does not implicate the constitutional infirmity with the ordinary-case approach that was identified in *Dimaya* and *Johnson* v. *United States*, 135 S. Ct. 2551, 2561 (2015). Indeed, the Court in those cases "d[id] not doubt" that such a case-specific approach, involving a jury finding beyond a reasonable doubt about the "real-world conduct" proved in the case, would be fully constitutional. *Dimaya*, 138 S. Ct. at 1215 (quoting *Johnson*, 135 S. Ct. at 2561).

1. The statutory language and structure support a case-specific inquiry under Section 924(c)(3)(B)

The text and context of Section 924(c)(3)(B) are, if anything, more strongly indicative of a case-specific approach than a categorical one.

As relevant here, conviction under Section 924(c) requires a jury to find (or the defendant to admit through a plea) that the defendant possessed, carried, or used a firearm; that he "committed all the acts necessary to be subject to punishment for" a crime of violence; and

that the possession, carrying, or use of the firearm was sufficiently connected to those acts. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999).

Where the conduct that constitutes the "crime of violence" is already part of the offense conduct that the government must prove to the jury, it is both natural and practical for the jury also to determine whether that conduct "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B). In the context of a criminal jury trial, an inquiry concerning "the course of committing the offense," *ibid.*, would presumptively be a question for the jury, not the judge. The "course of committing the offense" is the precise subject of the factual findings that a criminal jury is required to make beyond a reasonable doubt. One would not ordinarily suppose that a determination on that subject would instead turn on a "judge-imagined abstraction" of "an idealized ordinary case of the crime," *Dimaya*, 138 S. Ct. at 1216 (citation omitted).

The term "offense," as used in 18 U.S.C. 924(c)(3)(B), is thus most naturally understood to refer not just to the law the defendant has violated, but his particular violation of it. As the Court recognized in *Nijhawan* v. *Holder*, 557 U.S. 29 (2009), "in ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime, say, the crime of fraud or theft in general, and sometimes refer to the specific acts in which an offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed last month." *Id.* at 33-34. The Court in that case accordingly interpreted a provision that used the term "offense," 8 U.S.C. 1101(a)(43)(M), to "call[] for a 'circumstance-

specific,' not a 'categorical,' interpretation," *Nijhawan*, 557 U.S. at 36. And in *United States* v. *Hayes*, 555 U.S. 415 (2009), the Court similarly interpreted the phrase "an offense * * * committed by a current or former spouse," *id.* at 420 (quoting 18 U.S.C. 921(a)(33)(A)), as contemplating a factual, rather than a categorical, inquiry, see *id.* at 426.

That same case-specific meaning of "offense" would fit even more comfortably in Section 924(c)(3)(B). In the statutes at issue in both *Nijhawan* and *Hayes*, the term was used to refer to a *prior* offense that was relevant to a later proceeding. See *Nijhawan*, 557 U.S. at 32-33; *Hayes*, 555 U.S. at 420. In Section 924(c)(3)(B), by contrast, the term "offense" appears in the definition of the "crime of violence" that the government must prove to the jury that the defendant committed. 18 U.S.C. 924(c)(1)(A) and (3); *Rodriguez-Moreno*, 526 U.S. at 280. An "offense that is a felony," 18 U.S.C. 924(c)(3), can satisfy that definition in one of two alternative ways. See *Nijhawan*, 557 U.S. at 33-34 (recognizing that "felony," like "offense," can have a case-specific meaning). Under Section 924(c)(3)(A), it can be an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), in which case the jury's finding that the defendant committed the offense is in itself enough to establish a "crime of violence." Otherwise, under 18 U.S.C. 924(c)(3)(B), it is a crime of violence only in the event of a further determination that the offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

That further determination is one that a jury would be well-positioned to make (or find not to be supported) on the facts before it. Criminal statutes frequently ask juries to engage in similar real-world risk-based inquiries. As this Court recognized in *Johnson*, "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" to "gaug[e] the riskiness of conduct in which an individual defendant engages on a particular occasion." 135 S. Ct. at 2561 (emphasis omitted). For example, a typical reckless-endangerment or criminal-recklessness offense is defined as "recklessly engag[ing] in conduct which creates a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20 (McKinney 2009); see, *e.g.*, Ala. Code § 13A-6-24(a) (LexisNexis 2015); Alaska Stat. § 11.41.250(a) (2016); Ariz. Rev. Stat. Ann. § 13-1201(A) (2010); Ark. Code Ann. § 5-13-205(a)(1) (2013). Many other offenses in disparate areas of the criminal law—including arson, theft, sexual assault, threats, resisting arrest, vehicular homicide, and kidnapping—use similar risk-based formulations to define the crime or aggravating elements. See, *e.g.*, 21 U.S.C. 858; Conn. Gen. Stat. Ann. § 53a-111(a) (West 2012); Ind. Code Ann. § 35-43-4-2(a) (LexisNexis Supp. 2018); Iowa Code Ann. § 709.3(1) (West 2016); Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2017); Mass. Ann. Laws ch. 265, § 13L (LexisNexis 2010); Utah Code Ann. § 76-5-301(1)(b) (LexisNexis 2017).

The directive that the determination of risk be based on the "nature" of the offense does not suggest that the inquiry becomes an abstract question of law. "[T]he word 'nature' as used in the phrase 'by its nature' is commonly understood to mean 'the basic or inherent features, character, or qualities of something.'" *United*

States v. *Barrett*, No. 14-2641, 2018 WL 4288566, at *13 (2d Cir. Sept. 10, 2018) (quoting *Oxford Dictionary of English* 1183 (3d ed. 2010)). In Section 924(c)(3)(B), that "something" is the conduct of the defendant in violation of federal law. "It is entirely natural to use words like 'nature' and 'offense' to refer to an offender's actual underlying conduct." *Dimaya*, 138 S. Ct. at 1254 (Thomas, J., dissenting); see *id.* at 1254 n.7 (listing examples). Two violations of the same criminal statute can have very different natures; a conspiracy to commit arson of a rival gang's headquarters, for example, is "by its nature" different from a conspiracy to commit arson of one's own property for insurance money. See 18 U.S.C. 844(n). The focus on the "nature" of the offense, and not just the acts comprising it, would make the first conspiracy a "crime of violence" even if it was largely inchoate at the time of the defendant's arrest. The second conspiracy, to the extent it did not "involve[] a substantial risk" of "physical force against the person or property *of another*," 18 U.S.C. 924(c)(3)(B) (emphasis added), would not be, see 18 U.S.C. 844(i) (criminalizing arson of defendant's own property). But nothing in the text or context of Section 924(c)(3)(B) dictates that those two crimes must be treated the same way, or viewed at an abstract level of generality by a judge, rather than addressed on a case-specific basis by a jury.

2. Nothing requires an interpretation of Section 924(c)(3)(B) that would render it unconstitutional

This Court has never addressed whether Section 924(c)(3)(B) employs a case-specific approach or a categorical one. In the absence of guidance from this Court, the government and the lower courts have generally treated Section 924(c)(3)(B) analogously to similarly

worded provisions in other statutes that have been construed to incorporate a categorical approach. "It is a fundamental canon of statutory construction," however, "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts* v. *Sea-Land Air Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). And the context of Section 924(c)(3)(B) differs critically from the context of those other provisions. Indeed, in light of *Dimaya*, it is apparent that both the practical and the constitutional concerns that animated the categorical approach as to those provisions counsel in favor of a case-specific approach to Section 924(c)(3)(B).

a. This Court developed the categorical approach in the "singular context" of "*judicial* identification of what crimes (most often, state crimes) of *prior* conviction fit federal definitions of violent crimes so as to expose a defendant to enhanced penalties or other adverse consequences in *subsequent* federal proceedings." *Barrett*, 2018 WL 4288566, at *12. The "categorical approach" has two somewhat different forms, with the "ordinary case" approach at issue here representing an offshoot of the original version.

Under the original version of the categorical approach, which is "used to determine whether a prior conviction is for a particular listed offense (say, murder or arson)," "courts ask what the elements of a given crime always require—in effect, what is legally necessary for a conviction." *Dimaya*, 138 S. Ct. 1211 n.1; see *Taylor* v. *United States* 495 U.S. 575, 602 (1990). The Court subsequently adopted a modified form, used to analyze prior convictions under the ACCA's residual clause and 18 U.S.C. 16(b), which "requires a court to

ask whether 'the ordinary case' of an offense" satisfies a particular qualitative description. *Dimaya*, 138 S. Ct. at 1211 (quoting *James* v. *United States*, 550 U.S. 192, 208 (2007)).

b. As a practical matter, the Court recognized that a categorical approach, as applied to prior convictions, would avoid "the relitigation of past convictions in mini-trials conducted long after the fact." *Moncrieffe* v. *Holder*, 569 U.S. 184, 200-201 (2013); see also *Shepard* v. *United States*, 544 U.S. 13, 20 (2005) (describing the categorical approach as a "pragmatic" way to "avoid[] subsequent evidentiary enquiries"). The Court explained that in the absence of such an approach, a sentencing court would face the "daunting" practical difficulty of attempting to determine—potentially many years later—how a defendant's prior offense actually occurred. *Taylor*, 495 U.S. at 601. Prior convictions "that are counted for an ACCA enhancement are often adjudicated by different courts in proceedings that occurred long before the defendant's sentencing." *United States* v. *Robinson*, 844 F.3d 137, 142 (3d Cir. 2016), cert. denied, 138 S. Ct. 215 (2017). The same is true for many statutes that incorporate Section 16(b) in the context of classifying prior convictions, including the immigration statute at issue in *Dimaya*. See 138 S. Ct. at 1218 (opinion of Kagan, J.) (discussing the "utter impracticability" of a fact-based approach to classifying prior convictions under Section 16(b)) (quoting *Johnson*, 135 S. Ct. at 2562).

Not only is that practical concern nonexistent in the Section 924(c)(3)(B) context, but practical considerations in fact favor a case-specific approach. The application of Section 924(c)(3)(B) does not depend on a historical conviction, but rather on "a crime of *pending*

prosecution." *Barrett*, 2018 WL 4288566, at *12. A Section 924(c) prosecution necessarily involves a "developed factual record" about the underlying crime. *United States* v. *St. Hubert*, 883 F.3d 1319, 1335 (11th Cir.), petition for cert. pending, No. 18-5269 (filed July 13, 2018). Given the availability of a "record of all necessary facts," *Robinson*, 844 F.3d at 141, it is actually much *easier* for the jury to conduct a case-specific inquiry based on those "real-world facts" than it would be for a judge "to 'imagine' an 'idealized ordinary case of the crime,'" *Dimaya*, 138 S. Ct. at 1213-1214 (quoting *Johnson*, 135 S. Ct. at 2557).

c. From a constitutional perspective, "this Court adopted the categorical approach in part to 'avoid the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries.'" *Dimaya*, 138 S. Ct. at 1217 (opinion of Kagan, J.) (quoting *Descamps* v. *United States*, 570 U.S. 254, 267 (2013)) (brackets omitted). For example, a plurality of the Court in *Shepard* v. *United States*, *supra*, suggested that a judge's resolution of the disputed facts underlying a defendant's prior conviction at sentencing would be "too much like" the kind of factfinding that the Sixth Amendment requires the jury to conduct. 544 U.S. at 25 (opinion of Souter, J.). The *Shepard* plurality thus indicated that, in the context of the ACCA's residual clause, which increases the statutory sentencing range for certain federal firearm crimes if the defendant has a sufficient number of qualifying prior convictions, the categorical approach is supported by the "rule of reading statutes to avoid serious risks of unconstitutionality." *Ibid.* A plurality of the Court in *Dimaya* raised a similar concern in the context of Section 16(b), which likewise has "criminal sentencing consequences" in

some of its applications. 138 S. Ct. at 1217 (opinion of Kagan, J.).

Transposing that concern to the context of Section 924(c)(3)(B), however, would turn the principle of constitutional avoidance on its head. A case-specific approach to Section 924(c)(3)(B) could not invite any Sixth Amendment concerns; it would result in more jury findings, not fewer. But it *would* invite the vagueness concerns that led to the constitutional invalidation of the ACCA's residual clause and Section 16(b) in *Johnson* and *Dimaya*. See *Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2557-2558. As those decisions explain—in contrast to a provision that applies a "'substantial risk'" standard "'to real-world conduct'"—a provision that "'requires a court to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk * * * produces * * * 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Dimaya*, 138 S. Ct. at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2557-2558, 2561). An interpretation of Section 924(c)(3)(B) that steers straight into the teeth of *Johnson* and *Dimaya* cannot be reconciled with courts' "obligat[ion] to construe [a] statute to *avoid* [constitutional] problems" if it is "'fairly possible'" to do so. *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (emphasis added); see, *e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018) (explaining canon).

d. In the absence of the ordinary-case categorical approach to the ACCA and Section 16(b), it is highly unlikely that anyone would have invented or applied it in the context of Section 924(c)(3)(B). Before *Johnson* and *Dimaya*, it made sense to treat the textual similarities of the three statutes as an indication that all three

should employ that same approach. But any presumption to that effect disappeared once this Court identified the approach as a fatal defect in the other provisions. Given a viable alternative, which Section 924(c)(3)(B)'s text and context plainly offer, courts should construe Section 924(c)(3)(B) to avoid vagueness concerns—not introduce them. See *United States ex rel. Att'y Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) (explaining courts' "plain duty" to adopt any "reasonabl[e]" interpretation of a statute that avoids constitutional concerns, rather than holding the statute unconstitutionally vague).

B. The Question Presented Warrants This Court's Review

This Court should grant review expeditiously to itself address whether *Johnson* and *Dimaya* in fact require the constitutional invalidation of Section 924(c)(3)(B). That issue has generated circuit disagreement, caused widespread confusion and litigation in the lower courts, and impeded the enforcement of a federal statute that is critically important to controlling violent crime.

1. This Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional," even in the absence of a circuit conflict. *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013); see also, *e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015); *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *United States* v. *Alvarez*, 567 U.S. 709 (2012); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010); *United States* v. *Comstock*, 560 U.S. 126 (2010); *United States* v. *Stevens*, 559 U.S. 460 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008). That practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is "the gravest and

most delicate duty that th[e] Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)).

Here, an acknowledged post-*Dimaya* circuit disagreement already exists. Like the Fifth Circuit, the Tenth and D.C. Circuits have held that Section 924(c)(3)(B) is unconstitutionally vague in light of *Dimaya*. See *United States* v. *Salas*, 889 F.3d 681, 684-686 (10th Cir.), petition for cert. pending (filed Oct. 3, 2018); *United States* v. *Eshetu*, 898 F.3d 36, 37-38 (D.C. Cir.) (per curiam), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018). Those decisions include little analysis, instead relying on circuit precedent holding that Section 924(c)(3)(B) requires an ordinary-case approach and the nearly identical wording of Sections 16(b) and 924(c)(3)(B). See App., *infra*, 5a; *Salas*, 889 F.3d at 686; *Eshetu*, 898 F.3d at 37.

In contrast, the Second Circuit in *Barrett* expressly disagreed with other circuits and determined that Section 924(c)(3)(B) is not unconstitutionally vague because it "can be applied to a defendant's case-specific conduct, with a jury making the requisite findings about the nature of the predicate offense and the attending risk of physical force being used in its commission." 2018 WL 4288566, at *9; see *id.* at *8 n.8. The Second Circuit observed that neither the Tenth nor D.C. Circuits had "address[ed] whether continued reliance on an ordinary-case standard makes sense for a predicate offense of a pending § 924(c)(1)(A) crime, or whether the canon of constitutional avoidance mandates a different interpretation of the statute." *Id.* at *8 n.8. And the Second Circuit recognized that a case-specific approach is a reasonable construction of Section 924(c)(3)(B) that

"avoids not only the constitutional vagueness concerns that *Dimaya* * * * located in the categorical ordinary-case standard, but also the Sixth Amendment right-to-trial concern that originally prompted the Supreme Court to mandate a categorical approach to residual definitions of crimes of violence." *Id.* at *10; see also *id.* at *10-*12 (reviewing this Court's categorical-approach decisions and concluding that "the mandate for a categorical approach" does not apply to Section 924(c)(3)(B), which "defines a predicate offense for a crime of *pending* prosecution").

The uncertainty in the lower courts is not limited to those decisions. Even before *Dimaya*, a number of other courts had suggested abandoning the categorical approach to Section 924(c)(3)(B), without yet taking that step. See, *e.g.*, *St. Hubert*, 883 F.3d at 1334-1337; *In re Irby*, 858 F.3d 231, 234 (4th Cir. 2017); *Robinson*, 844 F.3d at 141; *United States* v. *Prickett*, 830 F.3d 760, 761 (8th Cir.) (per curiam), vacated, 839 F.3d 697 (8th Cir. 2016) (per curiam), cert. denied, 138 S. Ct. 1976 (2018); *Shuti* v. *Lynch*, 828 F.3d 440, 449-450 (6th Cir. 2016), cert. denied, 138 S. Ct. 1977 (2018). And after *Dimaya*, two courts of appeals have *sua sponte* ordered en banc review to reconsider whether Section 924(c)(3)(B) requires a categorical approach. *United States* v. *Simms*, No. 15-4640 (4th Cir. argued Sept. 26, 2018); *Ovalles* v. *United States*, No. 17-10172 (11th Cir. argued July 9, 2018). A petition for en banc review is also pending in the D.C. Circuit. *United States* v. *Eshetu*, No. 15-3020 (filed Aug. 31, 2018).

2. The widespread post-*Dimaya* disruption warrants this Court's immediate attention. Further percolation will just increase the confusion; the circuits are unlikely to reach uniformity on their own. And because the Tenth

Circuit has denied en banc review, Section 924(c)(3)(B) will now irrevocably be unenforceable in at least one part of the country unless and until this Court intervenes.

The invalidation of Section 924(c)(3)(B) is a massive blow to federal law-enforcement interests. In 2017 alone, more than 2700 defendants were charged with a Section 924(c) violation. U.S. Courts, *Table D-2—U.S. District Courts–Criminal Statistical Tables For The Federal Judiciary* (Dec. 31, 2017), http://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2017/12/31. The decision below would effectively immunize from Section 924(c) prosecution many defendants who commit offenses that do not technically fit the elements clause of the definition of "crime of violence," 18 U.S.C. 924(c)(3)(A), but that are undoubtedly violent, in the sense of involving by their nature a "substantial risk that physical force" may be used, 18 U.S.C. 924(c)(3)(B).

As the facts of this case vividly illustrate, that result would render Section 924(c) inapplicable to some of the most violent criminals on the federal docket. Conspiracy to commit the sort of violent robbery spree at issue here—involving gunpoint threats against store employees—indisputably "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B); see pp. 4-5, *supra* (detailing respondents' crimes); see also, *e.g.*, *United States* v. *Eshetu*, 863 F.3d 946, 949-950, 956 (D.C. Cir. 2017) (conspiracy to commit Hobbs Act robbery in which the defendants planned to rob a liquor store using knives, guns), vacated in part, 898 F.3d 36 (D.C. Cir.), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018). Other offenses that have been excluded include arson committed through firebombing, see *Salas*,

889 F.3d at 683, 687-688, and a kidnapping in which the victim was beaten, doused with gasoline, and had a firework placed in his mouth, *United States* v. *Jenkins*, 849 F.3d 390, 393-394 (7th Cir. 2017), vacated, 138 S. Ct. 1980 (2018); see Gov't C.A. Br. at 5-6, *Jenkins*, *supra* (No. 14-2898).

The problems are not limited to current and future prosecutions, but extend to past ones as well. Defendants whose convictions long ago became final are mounting collateral attacks to their convictions and sentences. See, *e.g.*, *Velleff* v. *United States*, 307 F. Supp. 3d 891, 892-896 (N.D. Ill.), appeal pending, No. 18-2308 (7th Cir. filed June 14, 2018). Decisions that call into question the validity of Section 924(c)(3)(B) thus undermine "the strong societal interest in finality," *Lee* v. *United States*, 137 S. Ct. 1958, 1967 (2017), by proliferating collateral attacks, creating litigation burdens, and potentially allowing violent criminals back on the street. This Court should expeditiously address whether that result is in fact required.

3. This case is a particularly good vehicle for addressing the question presented. It comes to the Court on a direct appeal and thus does not present any of the complications that might arise in a collateral-review posture. The court of appeals directly addressed and rejected the cases-specific approach advanced by the government, without suggesting that it had been forfeited or waived.

The question presented is also almost certainly outcome-determinative here. Construing Section 924(c)(3)(B) to incorporate a case-specific approach would not only preserve the statute's constitutionality, but should also preserve the convictions that the court of appeals vacated. The district court did not instruct the jury using

a case-specific approach, but the record allows for no reasonable doubt that a properly instructed jury would have found that respondents' conduct involved a substantial risk of physical force to person or property, thereby rendering any instructional error harmless. See *Neder* v. *United States*, 527 U.S. 1, 8-13 (1999). Indeed, the government made that very point in response to Glover's argument on appeal that a case-specific approach should be applied, and the government reasserted that view in its supplemental brief advocating for a case-specific approach. See pp. 8, 10-11, *supra*.

4. Simultaneously with the filing of this petition, the United States is also filing a petition for a writ of certiorari to review the judgment of the Tenth Circuit in *United States* v. *Salas*, *supra*. As explained in that petition, although *Salas* would otherwise be a suitable vehicle for reviewing the question presented, it may not be possible for that case to be heard by the full Court. Pet. at 7-8, *United States* v. *Salas* (filed Oct. 3, 2018). The government has expedited this petition in order to provide the Court with a good alternative vehicle that would allow the question presented to be briefed and argued this Term. In light of the paramount importance of that question, and the inability of any other court to resolve it definitively, the Court should grant certiorari in this case to address it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
MATTHEW GUARNIERI
Assistants to the Solicitor General
ROBERT A. PARKER
JOHN P. TADDEI
Attorneys

OCTOBER 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10330

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MAURICE LAMONT DAVIS; ANDRE LEVON GLOVER,
DEFENDANTS-APPELLANTS

Filed: Sept. 7, 2018

Appeals from the United States District Court
for the Northern District of Texas

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before: HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

On January 31, 2017, we issued an opinion in this case denying Andre Levon Glover's challenge to his conviction and sentence and Maurice Lamont Davis's (Davis and Glover, collectively, "Defendants") challenge to his sentence, affirming the district court's entry of judgment from the charges under 18 U.S.C. § 1951 and 18 U.S.C. § 924(c). *United States v. Davis*, 677 F. App'x 933, 935-36 (5th Cir. 2017) (per curiam). Defendants petitioned the Supreme Court for certiorari. Follow-

ing its decision in *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018), the Court remanded this case to our court "for further consideration" in light of *Dimaya*. *Davis v. United States*, 138 S. Ct. 1979, 1979-80 (2018). We requested supplemental briefing from the parties on the effect of the Court's decision and now (1) continue to affirm Defendants' conviction under Count Seven; (2) vacate Defendants' conviction under Count Two; and (3) leave the remainder of our prior opinion intact.[1]

The first question is whether *Dimaya* affects Defendants' convictions on Count Seven for illegally using or carrying a firearm in relation to a crime of violence, that is, Hobbs Act robbery. *See* 18 U.S.C. § 924(c). The conviction depends on whether Hobbs Act robbery is a "crime of violence" subsumed by § 924(c)(3)(a). Defendants urge us to extend *Dimaya* to reconsider our precedent on this question. In *United States v. Buck*, we held that "[i]t was not error—plain or otherwise —"to classify Hobbs Act robbery as a crime of violence under the § 924(c) elements clause, citing cases in the

---

[1] Specifically, Davis individually argues that his ACCA sentencing enhancement based upon multiple burglary convictions under Texas Penal Code § 30.02 cannot stand in light of *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), *petitions for cert. filed*, (U.S. Apr. 18, 2018) (No. 17-1445), *and* (U.S. May 21, 2018) (No. 17-9127). He notes that his case is still on direct appeal, and therefore, he is entitled to the benefit of *Herrold*. *See Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987). However, addressing that issue would exceed the scope of the Supreme Court remand, and therefore, we decline to do so at this time. *See Aladdin's Castle, Inc. v. City of Mesquite*, 713 F.2d 137, 138-39 (5th Cir. 1983). To be clear, we thus are not addressing *Herrold* on remand nor are we directing the district court to do so.

Second, Third, Eighth, Ninth, and Eleventh Circuits. 847 F.3d 267, 274-75 (5th Cir.), *cert. denied*, 138 S. Ct. 149 (2017). Nonetheless, Defendants argue that Hobbs Act robbery can be committed without the use, attempted use, or threatened use of physical force, because "fear of injury" is included in the definition of robbery. *See* 18 U.S.C. § 1951(b)(1).

We decline to extend *Dimaya*'s holding that far. Section 924(c) contains both an elements clause and a residual clause; the elements clause defines an offense as a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," whereas the residual clause defines an offense as a crime of violence if it, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *See* § 924(c)(3). *Dimaya* only addressed, and invalidated, a residual clause mirroring the residual clause in § 924(c); it did not address the elements clause. Whatever arguments may be made opposing Hobbs Act robbery's inclusion under the elements clause as a crime of violence, *Dimaya* has not affected them, and therefore, they are foreclosed to us in light of *Buck*. Thus, we affirm our prior judgment regarding Davis and Glover's convictions for violations of § 924(c) as predicated on Hobbs Act robbery.

Defendants' firearms convictions for knowingly using, carrying, or brandishing a firearm to aid and abet conspiracy to interfere with commerce by robbery under Count Two present a less clear question. We have held that conspiracy to commit an offense is merely an agreement to commit an offense. *United States*

v. Gore, 636 F.3d 728, 731 (5th Cir. 2011). Therefore, here, the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force. Accordingly, the Government concedes that Defendants could only have been convicted as to Count Two under the residual clause.

The Government attempts to change its prior approach to these cases on remand by abandoning its longstanding position that 18 U.S.C. § 924(c)(3)(B) should be analyzed under the categorical approach. In light of *Dimaya*, the Government argues we can, and should, adopt a new "case specific" method when applying the residual clause; this method would compare § 924(c)'s residual definition to the "defendant's actual conduct" in the predicate offense. Regardless of whether *Dimaya* would otherwise permit us to do so, we do not find a suggestion by a minority of justices in that case sufficient to overrule our prior precedent.[2] *See United States v. Williams*, 343 F.3d 423, 431 (5th Cir. 2003) ("We use the so-called categorical approach when ap-

---

[2] Justice Gorsuch, in concurrence, along with Justice Thomas, joined by Justices Kennedy and Alito, in dissent, suggested that an alternative approach to the categorical approach may be preferable in analyzing residual clauses. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment); *id.* at 1252-53 (Thomas, J., dissenting). However, the holding in *Dimaya* addressed § 16(b) as interpreted via the categorical approach, without deciding whether the statute could be interpreted under alternative approaches. *See id.* at 1217-18 (plurality opinion) (interpreting the categorical approach as the "best read[ing]" of the statutory text); *id.* at 1233 (Gorsuch, J., concurring in part and concurring in the judgment) (noting that other interpretive approaches may be possible, but that the parties conceded application of the categorical approach in this case).

plying [§ 924(c)(3)(B)] to the predicate offense statute. 'The proper inquiry is whether a particular defined offense, in the abstract, is a crime of violence.'" (quoting *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001))). Therefore, we must address the serious constitutional questions apparent in the residual clause of § 924(c)(3)(B) in light of *Dimaya*.

The Supreme Court rested its decision in *Dimaya* on its concerns about the language of the statute itself. Although § 16(b) contained linguistic differences to the Armed Career Criminal Act ("ACCA") residual clause the Court had previously invalidated in *Johnson v. United States*, 135 S. Ct. 2551 (2015), it noted that each statute contained "both an ordinary-case requirement and an ill-defined risk threshold," and this "'devolv[ed] into guesswork and intuition,' invited arbitrary enforcement, and failed to provide fair notice." *Dimaya*, 138 S. Ct. at 1223 (alteration in original) (quoting *Johnson*, 135 S. Ct. at 2559). Because the language of the residual clause here and that in § 16(b) are identical, this court lacks the authority to say that, under the categorical approach, the outcome would not be the same. We hold that § 924(c)'s residual clause is unconstitutionally vague. Therefore, Defendants' convictions and sentences under Count Two must be vacated.[3] We conclude this decision does not implicate

---

[3] Davis received a 120-month sentence as to Count Two, to run consecutively with a concurrent 188-month sentence as to Counts One, Five, and Six and a 300-month sentence as to Count Seven, along with a concurrent 120-month sentence as to Count Eight, for an aggregate sentence of 608 months. Glover also received a 120-month sentence as to Count Two, to run consecutively with a concurrent seventy-eight-month sentence as to Counts One, Three,

the sentences on the other counts. *U.S. v. Clark*, 816 F.3d 350, 360 (5th Cir. 2016).

Accordingly, we **AFFIRM** the judgment of the district court except with respect to the conviction and sentence as to Count Two; as to Count Two, we **VACATE** the conviction and **REMAND** for entry of a revised judgment consistent herewith.

Four, Five, and Six and a 300-month sentence as to Count Seven, for an aggregate sentence of 498 months.

PATRICK E. HIGGINBOTHAM, Circuit Judge, concurring in part and dissenting in part:

I concur only in the vacating of the Count Two conviction. With respect, the remedy afforded Davis is deeply flawed by two basic errors of law interlaced in effect.

First, in the majority's suggestion that we are here barred from considering issues beyond the scope of the Supreme Court's remand order. *Supra* at 2 n.1. After granting certiorari in this case, the Court vacated our previous opinion and remanded for consideration in light of the *Dimaya* decision. *Davis v. United States*, 138 S. Ct. 1979 (2018). In this circumstance we have jurisdiction to consider issues not addressed in the Supreme Court's mandate on remand. *Hill v. Black*, 920 F.2d 249, 250 (5th Cir. 1990), *modified on other grounds on denial of reh'g*, 932 F.2d 369 (5th Cir. 1991); *see also Moore v. Zant*, 885 F.2d 1497, 1503 (11th Cir. 1989).

Second, the majority errs in frustrating the district court's duty to construct proper sentences from a holistic examination of the intertwined acts of criminality for which the defendants were convicted. The majority remedies the error with respect to Davis and Glover's convictions under § 924(c)'s residual clause by reaching into their sentences and excising a period of time. But the aggregate sentences here—combinations of concurrent and consecutive sentences for different counts—resulted from a sentencing judgment by the district court. "'A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent.'" *Pepper v. United States*, 562 U.S. 476, 507 (2011) (quoting *United States v. Stinson*, 97 F.3d

466, 469 (11th Cir. 1996) (per curiam)). It is for the district court—not this court—to reach sentencing decisions in the first instance. "[A] district court's 'original sentencing intent may be undermined by altering one portion of the calculus'"—here reductions by 120 months of the defendants' 608-month and 498-month sentences. *Id.* (quoting *United States v. White*, 406 F.3d 827, 832 (7th Cir. 2005)). The majority concludes that excision of the sentences associated with Davis and Glover's Count Two convictions does not implicate their sentences relative to other counts, citing to our *Clark* decision. *Supra* at 5. But *Clark* was an appeal from a *district court's* decision. *Clark*, 816 F.3d at 354. There, the district court had determined that, after excision of time associated with a dismissed conviction, the petitioner's remaining aggregate sentence entailed an appropriate package without further adjustment. *Id.* at 360. If the instant case were an appeal from a district court's resentencing of Davis and Glover, I would find *Clark* controlling and reliance upon it sound. Today's decision, however, involves the Court of Appeals making that determination. A district court declining to adjust the remaining parts of its original sentencing package does not speak to an appellate invasion of the district court's sentencing prerogatives.

The appropriate remedy is to vacate Davis and Glover's entire sentences and remand for resentencing. *See United States v. Aguirre*, 926 F.2d 409, 410 (5th Cir. 1991) (Rubin, Politz, Davis) ("The proper remedy . . . is to vacate the entire sentence and remand for resentencing."). Such a disposition is especially appropriate where the district court in any event under current law may well be faced with constructing a new sentencing package. This because, lurking in the back-

ground of the majority's disposition in this case is another issue: the sentencing package here also included Davis's ACCA sentence enhancement predicated on convictions for Texas burglary. Were Davis resentenced, the district court would consider current law, including *United States v. Herrold*. 883 F.3d 517 (5th Cir. 2018) (en banc), *petitions for cert. filed*, (U.S. Apr. 18, 2018) (No. 17-1445), and (U.S. May 21, 2018) (No. 17-9127); *see Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987). Management of the sentencing process is best left to the court charged with the task and best situated to accommodate it. Here it should have the opportunity to revisit the entirety of the sentencing package including whether to defer resentencing pending the Supreme Court's disposition of petitions for certiorari in *Herrold*. The district court has been denied that opportunity. District courts are not mere "gatekeepers," and sentences often—as here—present as packages effectuating the district court's sentencing intent, as Chief Justice Rehnquist would remind.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10330

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MAURICE LAMONT DAVIS; ANDRE LEVON GLOVER,
DEFENDANTS-APPELLANTS

Filed: Jan. 31, 2017

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CR-94

Before: HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:*

Andre Levon Glover appeals his conviction and sentence and Maurice Lamont Davis appeals his sentence[1] in this case arising out of a series of similar robberies

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Although his prayer styles his challenges as directed only to his sentence, Davis seeks to vacate the convictions on Counts 2 and 7 as part of his requested resentencing.

at Murphy Oil locations across the Dallas Metroplex area during June of 2014.[2] We AFFIRM.

Glover's Challenge to his Hobbs Act Convictions. Glover challenges his convictions charging robberies in violation of the Hobbs Act which makes it unlawful to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. § 1951(a). Glover contends that the Government failed to prove the necessary impact on interstate commerce because all the robberies occurred within one state and only impacted merchandise (cartons of cigarettes) at local stores.[3] While conceding that the cigarettes themselves were manufactured out of state, Glover argues that the inventory and replacement inventory came from local Murphy Oil distribution centers or other stores. He also contends that the evidence was insufficient to connect him to two of the robberies (June 16 and 21).

This court reviews a challenge to the sufficiency of the evidence supporting a conviction by reviewing the evidence in the "light most favorable to the verdict to determine whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt."

---

[2] Counts 1 and 3-6 charged conspiracy and aiding and abetting Hobbs Act (18 U.S.C. § 1951) robberies; Counts 2 and 7 were firearms charges under 18 U.S.C. § 924(c)(1). Count 8 asserted only against Davis, was for felon-in-possession of a firearm under 18 U.S.C. § 922(g)(1).

[3] Glover also argues that the Government should be required to prove a "substantial effect" on interstate commerce but concedes that this argument is foreclosed by precedent. *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997).

United States v. Lewis, 774 F.3d 837, 841 (5th Cir. 2014) (citation omitted).

The Hobbs Act requires an effect on interstate commerce that is "identical with the requirements of federal jurisdiction under the Commerce Clause." *United States v. Villafranca*, 260 F.3d 374, 377 (5th Cir. 2001) (citation omitted). The defendant's activity on interstate commerce "need only be slight" but cannot be "attenuated." *Id.* (citation omitted). Here, cigarettes, a highly regulated commodity, travelled in interstate commerce and, following the robberies, had to be replaced by cigarettes that were manufactured and shipped from other states. While the Murphy Oil stores were local, the company itself is headquartered outside of Texas and conducts business in half the states. We conclude that the evidence was sufficient to support the interstate commerce nexus.

With respect to Glover's other sufficiency challenge, we note that Glover was apprehended following the second robbery on June 22. The similarities of the vehicles used, the clothing worn, the weapons employed, the items stolen, and the modus operandi between the June 22 robberies on the one hand and the June 16 and 21 robberies on the other are sufficient to support a conclusion by a rational juror beyond a reasonable doubt that the same person committed all of the robberies.

Glover's and Davis's Challenges to Counts 2 and 7. Both Glover and Davis contend that their convictions under 18 U.S.C. § 924(c) cannot stand in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which found a different statutory section to be unconstitutionally vague. In *Johnson*, the Court found the fol-

lowing portion of 18 U.S.C. § 924(e)(2)(B)(ii), known as the residual clause, defining "violent felonies" unconstitutionally vague: "or otherwise involves conduct that presents a serious potential risk of physical injury to another." In contrast to that language, § 924(c) involves the phrase "crime of violence" which, in turn, is defined, in relevant part, as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

Sitting en banc, we recently considered a similar argument involving 18 U.S.C. § 16(b), which contains the exact language of § 924(c)(3)(B), and held that the language is not unconstitutionally vague in light of *Johnson*. *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc), *petition for cert. filed*, (Sept. 29, 2016)(No. 16-6259). We reasoned that in contrast to the residual clause language at issue in *Johnson*, the risk of physical *force* in 18 U.S.C. § 16(b)—as opposed to the risk of physical *injury*—is more definite. *Id.* at 676. We concluded that by requiring the risk of physical force to arise "in the course of committing" the offense, the provision "does not allow courts to consider conduct or events occurring after the crime is complete." *Id.* (citation omitted).

We recognize the possibility that identical language in two different statutes could be differently construed but see no reason to do so here. We join several other circuits in concluding that *Johnson* does not invalidate § 924(c)(3)(B). *See United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 145-49 (2d Cir. 2016); *United States v.*

Taylor, 814 F.3d 340, 376-79 (6th Cir. 2016), *petition for cert. filed*, (Oct. 6, 2016)(16-6392).[4] We therefore do not reach the question of whether the Hobbs Act robbery charges would include a "use of force" element under 18 U.S.C. § 924(c)(3)(A).

Davis's Challenge to the Armed Career Criminal Act (ACCA) Enhancement. Davis argues that his prior convictions under Texas law for burglary of a building are not "crimes of violence" for purposes of the ACCA because the statutes under which he was convicted, Texas Penal Code § 30.01(a)(1) and (a)(3), are not divisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and some parts of these statutes do not qualify as "crimes of violence." However, he concedes that this challenge is foreclosed by our recent decision in *United States v. Uribe*, 838 F.3d 667, 669 (5th Cir. 2016).

Glover's Challenge to the "Abduction" Sentencing Enhancement. Glover contends that the district court erroneously enhanced his sentence for abduction in the June 16 (Lancaster), June 21 (Dallas), and June 22 (Mansfield) robberies because the movement of store clerks does not constitute a forced accompaniment to a "different location" within the meaning of U.S.S.G. § 2B3.1(b)(4)(A). Glover notes that the original PSR, which listed a criminal history score of I and an offense level of 28, did not contain the enhancement, presuma-

---

[4] Glover's alternative argument that the jury should decide what constitutes a crime of violence is meritless. A determination of whether a Hobbs Act robbery and respective conspiracy offenses should be classified as a crime of violence is a question of law reserved for the judge. *United States v. Credit*, 95 F.3d 362, 364 (5th Cir. 1996).

bly referring to the June 21 robbery (Dallas) because the enhancement was present for the Lancaster and Mansfield robberies. After the Government objected, the probation officer agreed that the enhancement was appropriate for the June 21 robbery. However, both the Government and the probation officer noted that, because of groupings of multiple counts, the enhancement for June 21 (Dallas) did not affect the guidelines calculation.[5] Indeed, Glover was sentenced on Counts 1 and 3-6 premised on Guidelines calculations that yielded a criminal history score of I and an offense level of 28, the same as it was before the enhancement for the June 21 (Dallas) robbery. Glover was sentenced to 78 months, the bottom of the Guidelines range, for those counts.[6] Given the specifics of the calculations in this case, if either the June 16 (Lancas-

---

[5] Glover does nothing to explain the math underlying the alleged error. However, an examination of the PSR illuminates the issue. The page to which Glover cites to support his argument that his sentence was enhanced by the abduction enhancement is a page from the Addendum to the PSR which states: "The inclusion of such [abduction] enhancement . . . does not affect the guideline computations." His brief states that his total offense level was increased by two levels due to this enhancement. This statement presumably refers to the two counts premised on the Lancaster and Mansfield robberies where the enhancement caused his offense level to be 24 which, in turn, was the "highest offense" level to which the multiple count adjustment of four was added. Had the enhancement not been in place for any count, the next "highest offense level" was 22. In turn, with the addition of the multiple count adjustment of four levels, his offense level would have been 26, rather than 28.

[6] Glover received consecutive sentences of 120 months and 300 months on Counts 2 and 7, respectively, for a total of 498 months.

ter) or the June 22 (Mansfield) enhancements were proper, then there would be no effect on his guidelines range making any error as to any other count harmless. *United States v. Castro-Alfonso*, 841 F.3d 292, 294 (5th Cir. 2016) (harmless error review applies to procedural sentencing errors).

We review the district court's application of the Sentencing Guidelines de novo and its factual findings for clear error. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (citation omitted). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *Id.* (citation omitted).

The Guidelines direct a court to enhance a defendant's sentence by four levels "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). The Guidelines define "abducted" to mean that "a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction." § 1B1.1 cmt.n.1.

The term "different location" is interpreted on a case-by-case basis. *United States v. Hawkins*, 87 F.3d 722, 726-28 (5th Cir. 1996). The term is "flexible and thus susceptible of multiple interpretations" and is "not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like." *Id.* at 728. In *Hawkins*, this court held that, despite escaping, the victims were "abducted" when a gunman forced them to walk approximately 40 to 50 feet from a location near his truck to a location near a van in the same parking lot. *Id.* at 728.

During the robbery of the Lancaster Murphy Oil on June 16, the store clerk testified that Glover's accomplice grabbed her from behind and forced her to go from the main kiosk "to the back part of the storage building" where the inventory is kept. The clerk was told to open the door and then "he forced [her] down once [she] got in the [storage] room." The robbery of the Mansfield Murphy Oil on June 22 occurred under similar circumstances. The clerk testified that as she was dragging the candy rack out of the storage room, a robber held a gun to her head and told her to get back into the storage room. The PSR concluded from the Lancaster and Mansfield robberies that the clerks were forced "to move from one area to another area, namely, the outside of the kiosk to the inside of the storage room," constituting abduction under § 2B3.1(b)(4)(A). We agree and conclude that the district court did not err in applying this enhancement.

Concluding that all of Davis's and Glover's challenges fail, we AFFIRM.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:15-CR-094-0(2)

UNITED STATES OF AMERICA

v.

MAURICE LAMONT DAVIS

Filed: Mar. 17, 2016

SENTENCING TRANSCRIPT

APPEARANCES:

FOR THE GOVERNMENT:

MR. JOHN KULL
US ATTORNEY'S OFFICE
1100 Commerce St
3rd Floor
Dallas, Tx 75242
214/659-8600
Fax: 214/659-8803
john.kull@usdoj.gov

FOR THE DEFENDANT:

MR. SAM OGAN
FEDERAL PUBLIC DEFENDER
525 Griffin St
Suite 629

Dallas, TX 75242
214/767-2746
Fax: 214/767-2886 FAX
Email: Sam_ogan@fd.org

* * * * *

[9]

THE COURT: Okay. Then there's a supervised release term on counts one, five, six, and eight of 1 to 3 years.

And on count two and seven, 2 to 5 years.

A fine range on counts one, two, five, six, seven, and eight of between $12,000 and $125,000.

And, of course, there's a mandatory special assessment of $100 per count.

Okay. Does the Government wish to be heard on sentencing?

MR. KULL: Just briefly, Your Honor. In the housekeeping matter that we addressed in codefendant's sentencing, Mr. Ogan joined with Mr. Mongaras in the defendant's Motion to Dismiss Counts Two and Seven prior to trial, document 56—ECF document 56 which the Government responded in document 59 on the motion to dismiss the counts and the Court, once again, had indicated during trial that it would take it up at sentencing so—

THE COURT: I will deny that objection or motion to dismiss, I should say.

MR. KULL: Thank you, Your Honor. I don't want the belabor the same argument I made for one code-

fendant is applicable with a couple of variations with regard to Mr. Davis because apparently now you are meeting the person which stands before you was the bad influence over the poor impressionable Mr. Glover and that would be Mr. Davis, the * * *

* * * * *

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:15-CR-094-0(1)

UNITED STATES OF AMERICA

v.

ANDRE LEVON GLOVER

Filed: Mar. 13, 2016

SENTENCING TRANSCRIPT

APPEARANCES:

FOR THE GOVERNMENT:

MR. JOHN KULL
US ATTORNEY'S OFFICE
1100 Commerce St
3rd Floor
Dallas, Tx 75242
214/659-8600
Fax: 214/659-8803
john.kull@usdoj.gov

FOR THE DEFENDANT:

MR. JAMES JOSEPH MONGARAS, JR.
SORRELS UDASHEN & ANTON
2311 Cedar Springs Rd
Suite 250

Dallas, TX 75201
214/468-8100
Fax: 214/468-8104
jjm@sualaw.com

* * * * *

[5]

MR. KULL: We do, Your Honor. But as a matter of housekeeping first, there was a motion filed by I believe both defendants prior to trial. It was the defendant's Motion to Dismiss Counts Two and Seven, ECF documents 56, based on unconstitutionality of the vagueness with the *Johnson* decision.

The Government responded to that in Government's Exhibit—or ECF document 59 as the Government's response to the defendant's Motion to Dismiss Counts Two and Seven.

I believe—if I remember correctly during trial the Court had indicated that it would rule on that at the sentencing and, of course, he's trying to get—the Defense is trying to get the 924(c) dismissed, so I'm assuming that the Court is going to deny that motion by the defense?

THE COURT: Yes.

MR. KULL: Okay. Thank you. With regard to punishment, Your Honor, I heard the term used earlier today, the "heinous nature of the offense," and that particularly applies in this particular case.

You had two individuals who were unemployed who obviously had gone through great planning and care in order to effectuate the robbery of four innocent people

who were working the graveyard shift that nobody else really wanted to work. The nature of the offense is particularly disturbing knowing that at the time of the offense Mr. Glover was on * * *

* * * * *

APPENDIX E

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

3. 18 U.S.C. 922(g) provides in pertinent part:

Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with

any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prose-

cuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

5. 18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all

other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.